state government will be held unconstitutional.[24] Conceivably the Supreme Court may decide that Congress has gone too far in the Child Labor Tax Law because the indirect result is to regulate a local matter. But to reach this decision they must overrule the *McCray* case and distinguish the case of *Veazie Bank v. Fenno*.[25] It does not seem likely that they will do so. While there may be no sound reason for differentiating between the commerce power and the taxing power in determining whether to go behind the face of the statute, it is not believed that *Hammer v. Dagenhart*[26] represents so complete a change in the court's attitude on the subject of judicial inquiry into legislative motive, evidenced by the effect of the statute, as must be effected before the Child Labor Tax Law can be held unconstitutional. Opinions may differ as to the wisdom of using taxation to accomplish an end, however commendable, other than the raising of revenue, but in seeking to escape one evil we should not fly to another. In the doctrine that the court may intrude its judgment upon questions of policy or morals whenever a statute comes before it, would be an equal danger, that of judicial autocracy.

T. W. S.

WHEN A BAILMENT BECOMES A PLEDGE

One of the most difficult combinations of facts which any court has recently been called upon to analyse was presented to the British Court of Appeal in the interesting case of *Blundell-Leigh v. Attenborough* [1921] 3 K. B. 235. On the first of November the plaintiff delivered to one Miller certain jewelry, under an agreement whereby the latter was to examine it and determine how much money he would offer to lend the former on it as security. Miller, on the third of November, pledged the jewelry for one thousand pounds to the defendant, who acted in good faith. Pursuant to an agreement made on November the fifth, Miller, on that date, loaned five hundred pounds to the plaintiff, who gave him her promissory note for six hundred pounds, payable in six equal monthly instalments, the whole amount to become due upon default in the payment of any instalment. Miller was to retain the jewelry, and the plaintiff gave him written authority to realize in case she defaulted. Miller subsequently borrowed three hundred pounds from one Berners and deposited with him the plaintiff's promissory note and the defendant's counterfoil deposit note. Miller committed

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[24] *The Collector v. Day* (1871, U. S.) 11 Wall. 113.

[25] (1869, U. S.) 8 Wall. 533, sustaining a tax on the notes of state banks, the obvious purpose and actual effect of which was to drive their circulation out of existence. There was, however, ground independent of taxation on which might be rested the power of Congress, namely its power to maintain the national currency.

[26] *Supra* note 2.

suicide on December the sixteenth. The plaintiff, having been notified by Berners that he was holding her note, paid him four hundred pounds. Without making a further tender to anyone, she sued the present defendant to recover possession of her jewels. The Court held[1] that the delivery of the jewelry to Miller on November the first was a delivery for the purpose of creating a pledge, which was completed on November the fifth; that the character of the delivery to Miller was not altered by the fact that the jewelry had in the meantime been prematurely pledged to the defendant; and that, as the plaintiff had made no tender, she could not recover possession of her jewelry.

It is believed that this case can be satisfactorily analysed only by considering it in its successive stages. In the first place, what was the situation when the plaintiff entered into the agreement with Miller on November the fifth? The delivery of the jewelry to Miller on the first seems to have been nothing more than a bailment,[2] although the Court apparently considered it as a sort of "inchoate pledge," since it spoke of "the pledge" having been completed on November the fifth.[3] The parties did not intend that Miller should hold the property as security until he became a creditor of the plaintiff, and it is of the essence of a contract of pledge that the *res* should be delivered as security for some debt or engagement.[4] Property may be pledged to secure a future debt,[5] but when the plaintiff delivered her jewels to Miller, there was no assurance that there would ever be a debt.[6] A mere agreement to create a pledge in the future is not a pledge.[7] There

[1] Reversing the decision of Salter, J., [1921] 1 K. B. 382.

[2] Story defines a bailment as "a delivery of a thing in trust for some special object or purpose, and upon a contract, express or implied, to conform to the object or purpose of the trust," and a pledge as "a bailment of personal property, as a security for some debt or engagement." Story, *Bailments* (8th ed. 1870) secs. 2, 286.

[3] It is difficult to reconcile the conclusion reached by the Court on this point with certain statements in its opinion. Lord Justice Bankes said: "It is obvious to my mind that the lady intended when she handed over this jewellery to Miller to create a valid pledge as between him and her from the moment when he handed her money by way of loan which she was prepared to accept." It is believed that this is a correct analysis of the situation. The learned judge seems to have been of the opinion that the pledge was created when the debtor-creditor relation was established. As a delivery, actual or constructive, is necessary to the creation of a pledge, it is believed that there never was a pledge from the plaintiff to Miller unless some such theory as that outlined in the second paragraph of this comment be accepted. See (1921) 37 L. QUART. REV. 398.

[4] Story, *op. cit.* sec. 300.

[5] *Moors v. Washburn* (1888) 147 Mass. 344, 17 N. E. 884; *Clymer v. Patterson* (1893) 52 N. J. Eq. 188, 27 Atl. 645.

[6] The jewelry was delivered to Miller in order that he might have an opportunity to examine it with a view to making an offer to lend money to the plaintiff on it as security. The parties did not intend Miller to hold the jewels as pledgee until he had made such an offer and the plaintiff had accepted it.

[7] *Howes v. Ball* (1827, K. B.) 7 Barn. & Cress. 481.

must be an actual or constructive delivery of possession.[8] Of course, if the *res* is already in the possession of the pledgee,[9] or his agent,[10] the pledge comes into existence when the contract is completed. But Miller had parted with the property while he was only a bailee; and when the contract of pledge was made between the plaintiff and himself, the defendant, who could in no sense be considered as Miller's agent, was in possession in his own right. A superficial glance at the facts seems inevitably to lead to the conclusion that the defendant held the goods wrongfully even after the ostensible pledge to Miller on November the fifth. Supposing, however, that the defendant had re-delivered the jewelry to Miller immediately after November the fifth, and the latter, being then in possession as pledgee, had re-pledged to the defendant, the latter apparently would then have held rightfully as sub-pledgee,[11] although, as a result of the original transaction, both he and Miller would have been liable to the plaintiff for a technical conversion.[12] Granting that the possession of the defendant might thus have been made rightful, may we not go a step further and say that, inasmuch as it is the modern tendency of the law to dispense with mere formalities, the omission of this formal procedure did not fundamentally alter the situation? There seems to be no sound reason for requiring the defendant temporarily to part with the property merely for the purpose of affording Miller an opportunity immediately to re-deliver it to him. Hence the defendant, although still liable for the technical conversion, was now rightfully in possession of the pledged articles.

Having thus arrived at the conclusion that the defendant became a rightful sub-pledgee as a result of the November-the-fifth transaction

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[8] 22 Halsbury, *Laws of England* (1912) tit. *Pawns and Pledges*, 238; 31 Cyc. 799, and cases cited.

[9] Story, *op. cit.* sec. 297.

[10] *City Bank of New Haven v. Perkins* (1864) 29 N. Y. 554.

[11] The authorities are not entirely satisfactory on the question of whether property may be re-pledged for a greater sum than that for which the original security was given. Statements may be found in the books to the effect that it is a conversion thus to re-pledge property. See *Douglas v. Carpenter* (1897) 17 App. Div. 329, 332, 45 N. Y. Supp. 219, 221; (1897) 11 HARV. L. REV. 201. But it is generally held that merely to re-pledge goods for a sum larger than the original debt is not a conversion. *Donald v. Suckling* (1866) L. R. 1 Q. B. 585. It is usually said that a pledgee can assign no greater right than he himself has. Jones, *Collateral Securities and Pledges* (3d ed. 1912) sec. 423. This is true, of course, but he may assign whatever interest he has, and a tender to the sub-pledgee of the amount due from the first pledger to the first pledgee extinguishes the title of the sub-pledgee. *Donald v. Suckling, supra; Talty v. Freedman's Savings & Trust Co.* (1876) 93 U. S. 321. Hence there was no actual conversion until the sub-pledgee refused to recognize the property of the first pledgor.

[12] The plaintiff did not, by entering into the contract of pledge on November the fifth, waive her cause of action for the conversion which occurred on November the third, because when she made the agreement with Miller she had no knowledge that a cause of action existed.

between the plaintiff and Miller, we may now proceed to an analysis of the various situations which arose between that transaction and the bringing of suit by the plaintiff. What was the effect of the sub-pledge to the defendant without a transfer of the debt which the property was originally pledged to secure? Prior to the delivery of the plaintiff's note to Berners, it seems that the defendant was privileged to retain the jewelry until the plaintiff made a tender to Miller of the amount due on her note.[13] The only effect of the subsequent assignment of the debt to Berners, therefore, was to place him in Miller's position with respect to the plaintiff, so that her right to the present possession of the jewelry became conditional upon a tender by her to Berners of the amount remaining unpaid on her note.[14] The language of the court concerning the necessity of a tender by the plaintiff is not exactly clear. The decision declares that a tender was necessary, but fails to indicate definitely to whom it should have been made. The language of Lord Justice Bankes, however seems to justify the inference that the Court would have required a tender to the defendant.[15] If the inference be correct, it would seem that the conclusion of the Court is open to question. That the pledgee of goods, other than negotiable securities, may not, by a sub-pledge thereof, prejudice the rights of his pledgor, is a principle which may be stated without qualification.[16] As was indicated before,[17] the transfer of the promissory note to Berners did not extin-

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[13] This would be true whether the English rule, which has been followed by some American courts, or the majority American rule should be applied, since there was no conversion by the defendant after November the fifth. See note 9, *supra*. According to the former rule, a pledgor whose goods have been wrongfully disposed of by his pledgee is not entitled to recover possession of them without tendering the amount of his debt to the person to whom it is due. *Donald v. Suckling, supra* note 11; *Talty v. Freedman's Savings & Trust Co., supra* note 11. Where the latter rule is followed, however, the pledgor may recover under such circumstances without making a tender, the pledgee being entitled to set off the amount due him. *Sproul v. Sloan* (1913) 241 Pa. 284, 88 Atl. 501.

[14] The only effect of the delivery of the counterfoil deposit note to Berners was to create in him as against the defendant the same right with respect to the jewels that Miller formerly had as pledgor of the defendant. By the delivery of the plaintiff's note to Berners, however, Miller vested in him whatever right Miller had against the plaintiff. This transaction did not, of course, prejudice the right of the plaintiff in her jewels. It merely had the effect of changing the person to whom she should tender the amount of her debt in order to have a right to the immediate possession of her jewelry.

[15] Lord Justice Bankes said: ". . . . I think that, there having been no tender, the defendant is entitled to judgment." Counsel for the defendant had said: "No tender having been made by the plaintiff to the defendant, who took the jewellery in pledge from Miller in good faith, the plaintiff is not entitled to recover." The writer of the headnote seems to have inferred from the language of the Court that a tender to the defendant was held to be necessary. The words of the headnote are: "The plaintiff having made no tender to the defendant was not entitled to recover the jewellery."

[16] Jones, *op. cit.* sec. 423.

[17] See note 14, *supra*.

guish the plaintiff's duty to discharge her debt, but she then owed it to Berners instead of Miller, and by tendering two hundred pounds to the former she would obtain a right to the immediate possession of her jewels. Since it is now settled law in England, however, that a pledgor whose goods have been wrongfully disposed of by his pledgee may not recover them or their value without tendering the amount of the debt which they were originally pledged to secure,[18] the Court was correct in holding that the plaintiff was not entitled to the present possession of her jewels; but it is to be regretted that it did not avail itself of the opportunity clearly to analyse a situation in the law of bailments and pledges which presents new and real difficulties.

A PROFESSOR'S SALARY AS INCOME FROM PROPERTY

Raymer v. Trefry (1921, Mass.) 132 N. E. 190, seems to be a case where there is too little analysis on the part of the law makers and too much on the part of the court. The question at issue was whether the salary of a Harvard professor was "income derived from property" within the language of the Massachusetts Income Tax Amendment of 1915.[1] That Amendment empowered the legislature to impose an income tax, with different rates upon "income derived from different classes of property," and with a lower rate upon "income not derived from property" than upon "income derived from property." A uniform rate, however, was required upon "income from the same class of property." The plaintiff claimed that a tax statute was unconstitutional because it taxed his salary, which he regarded as income not derived from property, at a higher rate than income derived from property, and specifically at a higher rate than income from annuities; such taxation, he contended, was not permissible under the grant of power contained in the Amendment.[2] The Court held, however, that the Statute was constitutional, since the plaintiff's salary was "income derived from property."

The purpose of the provisions of the Amendment as to different rates of taxation seems obvious. In England there has been since 1907 a difference in rates of taxation in favor of "earned" as against "unearned," or as termed by Gladstone, "lazy" incomes, that is in favor of incomes obtained by personal services as distinguished from

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[18] See note 13, *supra*.

[1] Mass. Const. Amendment 44, ratified November, 1915.

[2] By Mass. Gen. Acts, 1916, ch. 269, sec. 5 (a) income from annuities was taxed at 1½ per cent per annum, while by sec. 5 (b) income from professions, employments, trade, or business was taxed at the same rate. The objection is directed to Mass. Gen. Acts, 1919, ch. 324, sec. 1, which levied an additional tax of 1 per cent on all income received during 1918 and 1919 and taxable under sec. 5 (b) of the act of 1916. In *Tax Commissioner v. Putnam* (1917) 227 Mass. 522, 525, 116 N. E. 904, 907, the court refers to the various unsuccessful attempts to tax incomes made before the general grant of power given by the Amendment.